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No. 82-1464

In the Supreme Court of the United States

OCTOBER TERM, 1982

HARVEY NOBEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for interstate shipment of a security taken by fraud should be reversed because the trial judge, a stockholder in the defrauded company, did not disqualify himself, when petitioner specifically refrained from asking the judge to disqualify himself.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B3-B18) is reported at 696 F.2d 231.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on December 17, 1982. A petition for rehearing was denied on January 5, 1983 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on March 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 14 counts of a 15-count indictment charging interstate transportation of securities taken by fraud, in violation of 18 U.S.C. 2314 (Pet. App. B4). The district

court sentenced petitioner to concurrent 30-month terms of imprisonment on each count.

1. The indictment charged that petitioner, the owner of Beaverbrook Motors, a New Jersey towing service, and Christine Gilch, an employee of the Insurance Company of America (INA), devised a scheme to defraud INA, pursuant to which INA paid petitioner's company approximately $476,000 for nonexistent towing services. Gilch pled guilty and testified for the government. Prior to petitioner's indictment, he and INA entered into a settlement agreement that required petitioner to repay INA substantially all the funds he received as a result of the fraud.[1]

Petitioner's trial began on March 15, 1982. On that day, shortly before trial, the following colloquy occurred in the district judge's chambers (Pet. App. A1, B5):

> THE COURT: Counsel will recall a conference on the 18th of December, 1981, at 8:30 A.M., and I related that I am a substantial holder of INA stock.
>
> INA is not a party; nor is it the subject matter.
>
> I related that I didn't believe it was a basis for recusal.
>
> Now, when we had this conference neither Mr. Casper [Gilch's attorney] nor Mr. Nasuti [petitioner's attorney] were yet retained and my notes reflect that Mr. Casper anticipated no problem, and if, as I believe, there is no basis for recusal, would you, if you are so disposed, so relate.
>
> MR. NASUTI: Me, Your Honor?
>
> THE COURT: Yes.

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[1]The agreement is appended to the brief filed by the government in the court of appeals.

MR. NASUTI: Yes, Your Honor.

THE COURT: So you agree there is no basis for recusal.

MR. NASUTI: My research reveals that, agrees with Your Honor.

THE COURT: All right.

MR. NASUTI: With Your Honor's research and conclusion.

The December 18, 1981, conference adverted to in the above colloquy is unreported. No further discussion of recusal followed the March 15 conference.

On appeal, petitioner contended for the first time that his conviction should be reversed because the district judge should have recused himself. Petitioner relied on 28 U.S.C. 455(b)(4), which provides that a judge should disqualify himself if "[h]e knows that he * * * has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding," and on 28 U.S.C. 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

2. The court of appeals rejected petitioner's contention that Section 455(b)(4) required the judge's recusal. The court first ruled that the district judge did not have a financial interest that might be "substantially affected by the outcome of the proceedings" (Pet. App. B7-B9). The court noted that "[i]n some instances, the resolution of a criminal proceeding might have a substantial effect upon the financial affairs of the victim company" (*id.* at B8), but in this case, the settlement agreement obviated any possibility that the outcome of the prosecution could affect the district judge's financial interest. *Ibid.* The court of appeals also ruled that the district judge did not have a "financial interest

in the subject matter in controversy" (*id.* at B9) because "[i]n a criminal action, the victim is not the 'matter acted upon,' the 'matter presented for consideration,' nor 'the topic of dispute in a legal matter' * * *. The affairs of INA, the company defrauded, were not being resolved by the criminal proceeding nor were they the topic of dispute." *Id.* at B8-B9 (footnote omitted).

The court of appeals did rule, however, that the district judge's interest in INA was a sufficient ground for disqualification under the "appearance of impartiality" criterion of Section 455(a). Pet. App. B9-B11. The court of appeals "stress[ed] that" there was "no bias-in-fact by the trial judge in this case, nor has any been charged." *Id.* at B11 (footnote omitted). But the court declared: "We adopt the view that a judge who owns a substantial interest in the victim of a crime must disqualify himself or herself in the subsequent criminal proceeding" (*ibid.*). Nonetheless, the court of appeals did not reverse petitioner's conviction. The court explained (Pet. App. B12; footnote and citations omitted):

> The record shows that the district judge in this case made a full disclosure on the record of the relevant facts which now serve as the grounds on which new counsel bases the disqualification claim. Although the colloquy between the judge and trial counsel was apparently directed to the possibility of disqualification under section 455(b)(4), and did not specifically address disqualification under section 455(a), the information disclosed was sufficient to put defense counsel on notice of the relationship between the judge and INA. This is not a case where the nature of the disqualifying relationship was not discovered until the trial was concluded. The judge advised defense counsel before the trial began that he had a financial interest in INA and that this interest was substantial. Counsel made no

> request for any further information either at the time of the on-the-record colloquy or at any time thereafter during the five-day trial.

Judge Rosenn concurred in the result. He agreed with the majority's explanation of why the district judge's failure to disqualify himself did not violate Section 455(b)(4). Pet. App. B16. But in connection with Section 455(a), Judge Rosenn criticized the majority for establishing a blanket rule that a judge with a financial interest in the victim of a crime must always disqualify himself from the criminal prosecution, and then finding a "waiver" in this case. Judge Rosenn concluded instead that "[a]lthough there may be circumstances in which a trial judge's financial interest in a victim of a crime may compel his disqualification in a criminal trial, I do not believe that the record in this case establishes that the failure to disqualify under section 455(a) warrants a new trial" (*id.* at B17). Accordingly, Judge Rosenn found it unnecessary to find a "waiver" by petitioner in this case. *Id.* at B16.

Judge Rosenn gave three reasons for concluding that the district judge's failure to disqualify himself did not warrant the reversal of petitioner's conviction. First, he noted that the settlement agreement, which made the victim whole, made it "highly implausible" to suggest that the district judge's financial interest would have "appeared to involve him emotionally in the case." Pet. App. B17. Second, Judge Rosenn reasoned, "because defense counsel assented to the court's participation at trial when counsel and the trial judge discussed the question of disqualification under section 455(b)(4), it would appear that defense counsel himself had no reason to believe that the judge would be unable to preside * * * in an impartial manner." *Id.* at B17-B18. Finally, Judge Rosenn noted that whatever the proper resolution of the "waiver" issue, defense counsel plainly did not

"object at trial on section 455(a) grounds" and that this "subjects him to a particularly heavy burden on appeal to show that the court's impartiality might reasonably be questioned." *Id.* at B18.

ARGUMENT

The judgment of the court of appeals is correct, and petitioner fails to show that the court committed any error warranting this Court's review.

1. Petitioner conceded at trial, and the court of appeals unanimously held, that 28 U.S.C. 455(b)(4) did not require the district judge to disqualify himself. Petitioner now makes only a cursory argument to the contrary (Pet. 29-31). His suggestion that the victim of a crime is "the subject matter in controversy" at the subsequent criminal trial is contrary to the plain meaning of the language and unsupported by any case petitioner cites.

Petitioner's assertion of a conflict with *In re Rodgers*, 537 F.2d 1196 (4th Cir. 1976) is incorrect: *Rodgers* concerned 28 U.S.C. 455(b)(2), which requires a judge to disqualify himself "[w]here in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it"; *Rodgers* held only that a judge must disqualify himself from a criminal trial if the defendants intend to call his former law partner to give concededly relevant testimony. This holding plainly has no bearing on the question presented here. In fact, as petitioner elsewhere remarks (Pet. 16-17), the Fourth Circuit has specifically held that a judge with a financial interest in the victim of a crime need not disqualify himself. "No reason appears why owning stock in a holding company owning a bank that is robbed would lead to any reasonable apprehension that the stockholder judge would be partial.

* * * [A]ny interest the judge might possibly have in the case is so remote as to be for all practical purposes nonexistent." *United States* v. *Sellers*, 566 F.2d 884, 887 (4th Cir. 1977).

2. The only remaining issue is whether petitioner's conviction should be reversed because of the judge's failure to disqualify himself *sua sponte* under Section 455(a). Section 455(e) specifically permits a judge to accept a waiver of a ground for disqualification arising under Section 455(a). But because the March 15, 1982, colloquy in the judge's chambers did not focus specifically on Section 455(a), the government advised the court of appeals that it would not argue that petitioner's counsel's statements were a technical "waiver" within the meaning of Section 455(e).

But as the government also noted in the court of appeals (Gov't C.A. Br. 12-13), and as Judge Rosenn pointed out, whether or not there was a "waiver," the statements of petitioner's counsel, and his failure to object to the judge's decision to continue to preside, are plainly relevant to the question whether petitioner's conviction should be reversed. Counsel's attention was specifically focused on the question of disqualification, and he was invited to state his views. The fact that defense counsel offered no objection in these circumstances—or at any subsequent point during the trial—strongly suggests that the judge's impartiality could not "reasonably be questioned."

Moreover, petitioner is unable to explain why the judge's stock holdings might have called his impartiality into question. The settlement agreement between INA and petitioner ensured that the outcome of the prosecution could not possibly affect INA's fortunes.[2] By petitioner's own account

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[2]In any event, the United States Attorney informed the court of appeals that INA, as of the end of 1981, had approximately $11 billion in assets and 22,700 shareholders. Gov't C.A. Br. 14 n.6.

(Pet. 5-6), the only issue at the trial was whether petitioner's admitted acceptance of INA funds to which he was not entitled was innocent or fraudulent, and petitioner does not explain how the judge's financial interest in INA could affect his view of this issue. Other courts of appeals have permitted a judge with a financial interest in the victim of the crime to preside at the trial (see *United States* v. *Sellers*, *supra*; *United States* v. *Ravich*, 421 F.2d 1196, 1205-1206 (2d Cir.), cert. denied, 400 U.S. 834 (1970); see also *Department of Energy* v. *Brimmer*, 673 F.2d 1287, 1294-1295 (Temp. Emer. Ct. App. 1982));[3] indeed, petitioner asserts that the panel majority's dictum is "the first time in any reported decision in the United States" that a court has stated that a judge must be disqualified because of his financial interest in the victim of a crime (Pet. 12). Finally, while they offered somewhat different legal rationales, none of the judges of the court of appeals thought petitioner was entitled to relief. In view of these circumstances, and of the willingness of petitioner's counsel to have the district judge continue to preside, review by this Court is not warranted.

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[3]The court of appeals majority relied on Judge Butzner's dissent in *Sellers*, but that dissent appears to have rested not just on the judge's status as a holder of a financial interest in the bank that had been robbed but on the fact that the judge's brother was the "chief executive officer of the institution * * * ultimately responsible for the security of the institution and the safety of the employees" and that testimony of persons under the supervision of the judge's brother might "conflict[] with other evidence" presented at trial (566 F.2d at 888-889).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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